

**R.D. # 0005-04
Whippany, NJ**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**H.C.R. MANOR CARE
D/B/A ARDEN COURTS OF WHIPPANY¹**
Employer

and

CASE 22-RC-12444

**District 1199J, NUHHCE,
AFSCME, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

A. INTRODUCTION

The Petitioner and the Employer are in agreement that the appropriate unit in this matter consists of all full-time and regular part-time care givers, program service assistants, cooks, food service assistants and housekeepers employed by the Employer at its Whippany, New Jersey facility, excluding all food service coordinators, building service coordinators, resident service coordinators, resident service supervisors, administrative service coordinators, program service coordinators and marketing director as well as guards and supervisors as defined in the Act.. The Employer argues, contrary to the Petitioner, that the petitioned-for unit must also include administrative services assistants. The Petitioner claims this classification is properly excluded from the unit as those employees are office clericals. The Employer also argues that senior resident caregivers, a classification which is presently unfilled but that the Employer envisions will be staffed sometime in the future, should be specifically excluded from the unit as supervisors.

For the reasons set forth below, I find that the community of interest that administrative services assistants share with employees whom the parties agree should be included in the unit is not so compelling that it requires or mandates their inclusion in the

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

unit. Additionally, as I find the record was devoid of evidence to establish that senior resident caregivers are supervisors under the Act, and further noting that no individuals are currently employed in this classification, I make no finding specifically excluding this classification from the bargaining unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Upon the entire record in this proceeding,³ I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.⁴
2. The Employer is engaged in commerce within the meaning of the Act; and it will effectuate the purposes of the Act to assert jurisdiction herein.⁵
3. The labor organization involved claims to represent certain employees of the Employer.⁶
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

All full-time and regular part-time caregivers, program service assistants, cooks, food service assistants and housekeepers employed by the Employer at its Whippany, New Jersey facility, excluding all office clerical employees including administrative service assistants, food service coordinators, building service coordinators, resident service coordinators, resident service supervisors, administrative service coordinators, program service coordinators, marketing director, guards and supervisors as defined in the Act.⁷

³ Briefs filed by the parties have been fully considered.

⁴ I find that the hearing officer's rejection of the Employer's proffered Exhibit 3, the job description of senior resident caregivers was appropriate. The Employer admitted it has not filled the position of senior resident caregiver in the three years the facility has operated. Additionally, the Employer's witness could not state with any degree of specificity as to when such positions would be filled. I have concluded that making a determination as to the supervisory status of this classification under the circumstances, as urged by the Employer, would be solely based on speculation and, therefore, the hearing officer properly excluded the exhibit.

⁵ The Employer, a Delaware corporation, is engaged in the operation of an assisted living facility for Alzheimer patients at its Whippany, New Jersey facility, the only facility involved herein.

⁶ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁷ There are approximately 30 employees employed in this unit.

B. FACTS

1. The Employer's Operations

The only witness to testify at the hearing was Douglas Wanke, the Employer's regional director of operations, who is responsible for overseeing 16 assisted living facilities. Wanke testified that the Employer's Whippany facility is an assisted living facility specializing in the care of individuals with beginning and middle stage Alzheimer's disease and related dementia. At the time of the hearing the Employer had 41 residents in a 60 resident facility.

The facility consists of four resident wings, or houses, located off a central area in which is located a community center, crafts room, barber and beauty shop and health center. At the front of the facility is a lobby, off of which is an administrative office area. All employees use the same parking lot, as do visitors to the facility. All employees use an employee break room located adjacent to the beauty shop.

2. The Undisputed Classifications

Employees are paid hourly. Benefits, vacations and holidays are consistent among all the employee classifications. Employees clock in and out in the back of the facility, although Wanke was not sure where administrative service assistants clock in and out. All the employees in the undisputed classifications work "behind the door" separating the lobby from the rest of the facility.

Caregivers are responsible for the direct care of the residents: assisting them with activities of daily living, providing meals and changing them. Caregivers are certified home health employees. They earn \$8.00 to \$10.00 per hour or more and work 3 regular shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. The resident services supervisor or the resident services coordinator supervises caregivers.

Program services assistants support the program services coordinator in providing programs and activities for residents in the facility. They earn between \$8.00 and \$9.00 per hour, work flexible schedules to provide residents with activities over the course of the day and on weekends, and are supervised by the program services coordinator.

Housekeepers clean the facility. Both the caregivers and housekeepers make up resident rooms. Housekeepers earn approximately \$8.00 per hour, work from 7 a.m. to 3 p.m. during the week and on weekends and are supervised by the building services coordinator.

Food service assistants assist in food preparation, clean dishes and maintain the kitchen. Food service assistants work from about 4:00 p.m. until about 8:00 p.m. Cooks prepare three meals a day for residents. Their shifts cover the time from about 6 a.m. until 6:30 or 7 p.m. Cooks have safe service certification. The food service coordinator supervises the kitchen staff.

3. Administrative services assistants

Administrative services assistants work primarily at the front of the facility at the desk in the lobby of the facility. When the administrative services assistants are not working, no one sits at the front desk. Administrative services assistants serve as receptionists; answering the telephone and greeting the public entering the facility; perform clerical and administrative duties, such as copying, putting together reports and maintaining files. They also provide support to the administrative services coordinator. Administrative services assistants earn \$7.50 to \$9.00 per hour. The sole prerequisite for administrative services assistants is a high school education. At the time of the hearing, there were three administrative services assistants on staff, who work at the facility one at a time. In general, at the Employer's other facilities, one administrative services assistant works from 2 p.m. until 6 or 7 p.m., another works 4 p.m. until 7 or 8 p.m. and a third works weekends 11 a.m. until 4 or 5 p.m. The Employer's witness could not testify with specificity what hours the administrative services assistants work at the Whippany facility.

The administrative services coordinator supervises the administrative services assistants. In conjunction with the executive director, the administrative services coordinator prepares the administrative services assistants' evaluations. The administrative services coordinator does not supervise any of the other individuals in the petitioned-for classifications.

Wanke stated that the Employer has a "universal caregiver" approach to its mission in which employees perform tasks of other classifications when they are permitted by law to do so. Administrative services assistants could fill in for program services assistants or help in the kitchen, according to Wanke. Additionally, one of the other employees could be used to fill in for administrative services assistants, performing their duties whether because the facility was short staffed or because that individual needed to work light duty. However, Wanke had no personal knowledge of any instances where an administrative services assistant actually performed the work of personnel in one of the other unit classifications. Nor could he cite a specific instance of an individual from another classification filling in for an administrative services assistant. Wanke testified that, when administrative services assistants are performing tasks of caregivers, program service assistants or food service assistants the resident service coordinator, program service coordinator or food services coordinator, respectively, supervises the administrative services assistant. However, as noted above, Wanke could not cite a single instance of administrative services assistants actually performing those tasks.

While the Employer's witness testified that administrative services assistants could be promoted to or otherwise move into one of the other petitioned for positions if they had the credentials, he knew of no instance when this occurred at the facility. Nor did he know of any other employee being promoted to or otherwise moving into an administrative services assistant position.

C. DISCUSSION

1. Administrative Service Assistants

In this matter, noting that the unit sought appears to be appropriate on its face, as it includes all service and maintenance employees, save for traditional exclusions, I find that the unit sought by the Petitioner constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. *Laurel Associates, Inc., d/b/a Jersey Shore Nursing and Rehabilitation Center*, 325 NLRB 603 (1998).

In making unit determinations the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. *P.J. Dick Contracting*, 290 NLRB 150 (1988). In doing so, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If however, it is inappropriate, the Board will scrutinize the Employer's proposals." *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). Although the unit sought by a petitioning labor organization is a relevant consideration in determining the scope of a bargaining unit, a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to the unit requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Dezcon, Inc.*, above. Although an employer may seek a broader unit and that unit may be appropriate, it does not necessarily render the petitioner's unit inappropriate. *Overnite Transportation Co.*, above. As noted above, I find that the unit sought by the Petitioner is appropriate for purposes of collective bargaining.

Unlike acute care facilities, the Board has not taken a rule-making stance in regard to nursing care or assisted living facilities. *Park Manor Care Center*, 305 NLRB 872 (1991). To apply the rules promulgated by the Board for acute care facilities to the instant matter, as the Employer suggests, would not be appropriate. *The Board's Rules in the Health Care Industry*, 284 NLRB 1515 (1987), 29 C.F.R. Section 103.30(f)(2)⁸. Rather, to determine the appropriateness of a petitioned for unit in the instant matter, the appropriate test is a community of interest test as in nursing care facilities. *Marion Manor for the Aged and Infirm, Inc.*, 333 NLRB 133 (2001); *Park Manor Care Center*, 305 NLRB 872 (1991). The criteria to be considered therefore are: degree of functional integration; common supervision; nature of employee skills and functions; interchangeability and contact among employees; common work sites; general working conditions and fringe benefits. In the instant matter, the bulk of the criteria weigh heavily towards the finding that the administrative services assistants do not share a community of interest with the unit sought by the Petitioner.

While the record reflects that the fringe benefits and general working conditions of all employees are the same; all employees are paid hourly wages and the same policies regarding vacations and holidays apply, the record clearly shows that other factors indicate the administrative services assistants do not share a community of interest with the individuals in the petitioned-for unit.

⁸ Likewise, the Employer's reliance on *St. Francis Hospital*, 271 NLRB 948 (1984), a case decided before the Board engaged in rulemaking, is misplaced as the Employer in *St. Francis* was an acute care facility, unlike the Employer in the instant matter.

In this regard, the administrative services assistants work at the desk in the front lobby apart from the petitioned-for unit separated by a locked door. The record revealed no evidence showing contact between the administrative services assistants and other employees other than sharing a break room, the record was silent as to the timing of employee breaks. The parking lot is used by everyone at the facility, employees and visitor alike.

Administrative services assistants are the only employees supervised by the administrative services coordinator. Additionally, the record demonstrates that the skills and functions of administrative services assistants who act as receptionists, doing filing and other clerical tasks, are entirely separate from individuals who work caring for the residents, providing programs and activities for the residents, preparing resident meals and cleaning the facility. I note that the record establishes the administrative services assistants are clearly office clerical employees; a classification traditionally excluded from service and maintenance units.

In view of the above and the record as a whole, I find that the administrative services assistants do not share such a strong community of interest with the Employer's other employees that their inclusion is required in the bargaining unit. For all of these reasons, I will exclude administrative services assistants from the bargaining unit.

2. Senior Resident Caregivers

The Employer admitted it has not filled the position of senior resident caregiver in the three years the facility has operated. Additionally, the Employer's witness could not state with any degree of specificity as to when such positions would be filled in the future. I have concluded that making a determination as to the supervisory status of this classification under the circumstances, as urged by the Employer, would of necessity be solely based on speculation. I conclude that it would be inappropriate to make a finding that some as yet to be employed individuals are supervisors under Section 2(11) of the Act. Therefore, I will not specifically include or exclude senior resident caregivers from the bargaining unit.

D. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who

have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **District 1199J, NUHHCE, AFSCME, AFL-CIO.**

E. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **April 1, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

F. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **April 8, 2004**.

Signed at Newark, New Jersey this 25th day of March 2004.

/s/Gary T. Kendellen

Gary T. Kendellen, Regional Director
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